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No. 06-959

IN THE SUPREME COURT OF THE UNITED STATES

CARLOS FLORES,
Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit erred in holding that, to determine the commencement of the one-year statute of limitations under the AEDPA, a state conviction becomes final when the time for seeking direct review expires, rather than when the state court issues its mandate.

2. Whether the Fifth Circuit erred in holding that the district court abused its discretion in applying the doctrine of equitable tolling.

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RESPONDENT QUARTERMAN'S[1] BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This is a federal habeas corpus proceeding in which Petitioner Carlos Flores unsuccessfully challenged his presumptively valid state convictions for murder and deadly conduct and the corresponding life sentence and ten-year sentence pursuant to 28 U.S.C. § 2254. In the court below, Flores appealed the district court's rejection of his claims on the merits. However, the court of appeals held that Flores's petition was untimely under the statute of limitations and that the district court abused its discretion in granting equitable tolling. The court of appeals's decisions were correct, and Flores is not entitled to certiorari review.

STATEMENT OF THE CASE

I. Proceedings in State Court

In cause number 98CR3286, in the 290th District Court of Bexar County, Texas, styled *The State of Texas v. Carlos Flores*, Flores was convicted of murder and deadly conduct. Tr[2] at 126-29. On February 25, 1999, the jury assessed punishment of imprisonment for life as to the murder charge, and ten years as to the deadly conduct charge. Tr 126, 128.

Flores's conviction was affirmed in an unpublished opinion by the Fourth Court of Appeals of Texas on August 23, 2000. *Flores v. State*, No. 04-99-00373-CR (Tex. App. — San Antonio 2000, no pet.). Flores did not seek a petition for discretionary review

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1 Respondent Nathaniel Quarterman will be referred to as "the Director."

2 "Tr" refers to the transcript of papers filed in the trial court, followed by the page number(s).

("PDR") to the Texas Court of Criminal Appeals. PA[3] 2a. The court of appeals issued its mandate on November 17, 2000. PA 2a. Flores filed a state habeas corpus application on November 15, 2001, which was denied on April 2, 2003. PA 2a. Flores filed his federal writ petition on December 6, 2002, while his state habeas corpus application was still pending. PA 2a.

II. Proceedings in Federal District Court.

The Director moved that the petition be dismissed as having been untimely filed. PA 2a; R 113; docket entry 19. The magistrate judge recommended that Flores's petition be dismissed as untimely. PA 49a, 53a. The district court overruled the magistrate judge's recommendation. PA 38a, 48a. The district court found that although the petition was untimely, Flores was entitled to equitable tolling. PA 39a-48a. The director then answered on the merits. R 186; docket entry 37. The magistrate judge recommended that the petition be denied. PA 23a, 36a. The district court adopted the magistrate judge's memorandum and recommendation and denied the petition. PA 9a, 22a.

III. Proceedings in the Fifth Circuit.

Flores appealed. PA 1a. The district court granted a certificate of appealability on the merits of some of Flores's claims. R[4] 281; docket entry 48. However, the Fifth Circuit affirmed the judgment without reaching the merits. PA 7a. The Fifth Circuit held that Flores's federal petition was untimely under *Roberts v. Cockrell*, 319 F.3d 690, 694 (5th Cir. 2003), and that the district court abused

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[3] "PA" refers to the appendices to Flores's petition for writ of certiorari, followed by the page number.

[4] "R" refers to the record on appeal to the Fifth Circuit, followed by the page number.

its discretion in granting equitable tolling. PA 2a-7a.

ARGUMENT

I. The First Question Presented for Review — Whether a State Law Definition of "Finality" Controls Over a Federal Statute's Definition of "Finality" — Is Unworthy of the Court's Attention.

The Rules of the Supreme Court provide that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." SUP. CT. R. 10 (West 2006). Flores argues there is a conflict between the Fifth Circuit's opinion in *Roberts v. Cockrell*, 319 F.3d 690 (5th Cir. 2003), and *Tinker v. Moore*, 255 F.3d 1331, 1333 (11th Cir. 2001). Because it is not clear that the aspect of *Tinker* on which Flores relies is still good law in the Eleventh Circuit, it is not clear that there is a conflict between the Fifth Circuit and Eleventh Circuit on the same matter. *See* SUP. CT. R. 10(a). Additionally, the Fifth Circuit's reasoning in *Roberts* was consistent with this Court's opinion in *Clay v. United States*, 537 U.S. 522 (2003). Thus, there is no compelling reason warranting review, and certiorari should be denied.

A. *Tinker v. Moore*

In *Tinker*, the Eleventh Circuit held that the federal writ petition was untimely. *Tinker v. Moore*, 255 F.3d at 1333-34. In determining when the limitations period began, the court stated:

> Under Florida law, a judgment against a criminal defendant becomes final upon issuance of the mandate on his direct appeal. *See Jones v. State*, 602 So.2d 606, 607-08 (Fla. Dist. Ct. App. 1992). Tinker's mandate issued on February 14, 1997, and thus he had until February 13, 1998, to file his § 2254 petition, absent tolling of the limitations period.

Tinker v. Moore, 255 F.3d at 1333. The court offered no rationale for why it chose to use the state-law determination of finality to arrive at the date of finality under 28 U.S.C. § 2244(d)(1)(A).[5]

B. *Roberts v. Cockrell*

In *Roberts v. Cockrell*, 319 F.3d 690 (5th Cir. 2003), the Fifth Circuit determined when a state conviction becomes final for purposes of 28 U.S.C. § 2244(d)(1)(A). The court stated it was not bound by the definition of finality under state law. *Id.* at 693. The court found "no reason to look to state law to determine when a state conviction becomes final for the purposes of § 2244(d)(1)(A)." *Id.* at 694.

C. It is not clear that *Tinker* is still good law in the Eleventh Circuit for the proposition that the state-law definition of "finality" controls the § 2244(d)(1)(A) finality determination, so there is no clear conflict with the Fifth Circuit.

It is not clear to what extent *Tinker* is still good law in the 11th Circuit. In *Bond v. Moore*, 309 F.3d 770 (11th Cir. 2002), the Eleventh Circuit held that a Florida prisoner's conviction did not become final under § 2244(d)(1)(A) until the expiration of the 90-day period for filing a petition for writ of certiorari with the Supreme Court. *See also Nix v. Secretary for the Department of Corrections*, 393 F.3d 1235 (11th Cir. 2004) (Florida prisoner's

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[5] 28 U.S.C. § 2244(d)(1)(A) provides, "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a State court. The limitation period shall run from the latest of . . . the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review."

conviction became final under the Antiterrorism and Effective Death Penalty Act (AEDPA) ninety days after the state appellate court affirmed the judgment). In *Chavers v. Secretary, Florida Department of Corrections*, 468 F.3d 1273 (11th Cir. 2006), the Eleventh Circuit held that "the entry of judgment, and not the issuance of the mandate, is the event that starts the running of time for seeking Supreme Court review, within the meaning of Supreme Court Rule 13.3 and 28 U.S.C. § 2244(d)(1)(A)." *Id.* at 1275. Thus, the Eleventh Circuit now appears to determine finality pursuant to federal law, rather than state law.

Moreover, Florida's appellate system differs from Texas. In Texas, appellate decisions of the intermediate courts of appeals are reviewable by the Texas Court of Criminal Appeals. TEX. CONST. art. V, § 5; TEX. CODE CRIM. PROC. art. 4.04, § 2; TEX. R. APP. P. 66.1. Thus, in Texas, the appellate process for non-death penalty felony convictions moves from a state intermediate court of appeals to the Texas Court of Criminal Appeals to this Court.

In Florida, however, the Florida Supreme Court cannot review a *per curiam* affirmance by the lower appellate court. *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987); *Jenkins v. State*, 385 So.2d 1356, 1359 (Fla. 1980). Therefore, the appellate process in Florida moves from the lower appellate court to the United States Supreme Court in some instances and from the lower appellate court to the Florida Supreme Court to the United States Supreme Court in other instances.

The Eleventh Circuit has decided the § 2244(d)(1)(A) finality issue in an appellate-process situation similar to that in Texas. In *Pugh v. Smith*, 465 F.3d 1295 (11th Cir. 2006), the Eleventh Circuit faced a situation similar to Flores's. Pugh's conviction was affirmed by the Georgia Court of Appeals, but Pugh did not seek further direct review. There, the Eleventh Circuit determined that a Georgia prisoner could appeal an intermediate appellate court's

decision affirming a conviction to the Georgia Supreme Court. *Id.* at 1300. The court held that Pugh's conviction became final at the expiration of the 10-day period in which he could have sought review in the Georgia Supreme Court. *Id.* at 1299-1300. The Eleventh Circuit's approach was the same as the Fifth Circuit's in *Roberts*. The Eleventh Circuit examined Georgia law to determine whether Pugh could have sought review in a higher state court. *Id.* at 1300. But, importantly, the court did not examine when a conviction becomes final for state law purposes.

In fact, in determining how resentencing affects the finality of a state judgment of conviction, the Eleventh Circuit noted in another case, "While the interpretation of § 2244 is a matter of federal law, we remain sensitive to state law where appropriate. *See Roberts v. Cockrell*, 319 F.3d 690, 693 (5th Cir. 2003)." *Rainey v. Secretary for the Department of Corrections*, 443 F.3d 1323, 1328 n.6 (11th Cir. 2006).

Thus, it appears that *Tinker* is no longer viable in the Eleventh Circuit for the proposition that the state-law definition of finality controls the § 2244(d)(1)(A) finality determination. Therefore, there is no current conflict, or at least no clear conflict, between the Eleventh Circuit and the Fifth Circuit in this regard.

D. In *Roberts*, the Fifth Circuit correctly held that finality under § 2244(d)(1)(A) is determined by federal law, which is the statue itself.

Flores does not suggest why state law, rather than federal law, should control finality under § 2244(d)(1)(A). The Fifth Circuit's decision in *Roberts* was correct.

In *Clay v. United States*, 537 U.S. 522 (2003), which issued after *Tinker* was decided, this Court addressed finality under 28 U.S.C. § 2255. This Court discussed the differences between § 2255, ¶ 6(a) (federal prisoners) and § 2244(d)(1)(A) (state

prisoners). Section 2255, ¶ 6(a) provides that the limitations period runs from "the date on which the judgment of conviction becomes final." Section 2244(d)(1)(A) provides that the limitations period runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." This Court stated:

> [O]ne can readily comprehend why Congress might have found it appropriate to spell out the meaning of "final" in § 2244(d)(1)(A) but not in § 2255. Section 2244(d)(1) governs petitions by state prisoners. In that context, a bare reference to "became final" might have suggested that finality assessments should be made by reference to state-law rules that may differ from the general federal rule and vary from State to State. . . . The words "by conclusion of direct review or the expiration of the time for seeking such review" make it clear that finality for the purpose of § 2244(d)(1)(A) is to be determined by reference to a uniform federal rule.

Clay v. United States, 537 U.S. at 530-31.

Therefore, this Court has recognized that the finality determination is not based on whether a conviction is deemed "final" by state law. Rather, finality is determined by the conclusion of direct review or the expiration of time for seeking such review.[6]

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[6] In other contexts, courts have held that the construction of federal statutes is a question of federal, not state, law. *See, e.g., Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 111 (1993) ("whether one has been 'convicted' within the meaning of the gun control statute [18 U.S.C. § 1202(a)(1)] is . . . a question of federal, not state, law" (citation omitted)); *Johnston v. United States*, 85 F.3d 217, 219 (5th Cir. 1996) ("[w]hile substantive state law

Roberts:

> The language of § 2244(d)(1)(A) provides that a decision becomes final "by the conclusion of direct review or the expiration of the time for seeking such review." We previously held that direct review includes a petition for writ of certiorari to the Supreme Court. Therefore, the "conclusion of direct review" is when the Supreme Court

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determines whether a cause of action exists, federal law determines when that claim accrues" for statute of limitations calculation in a suit brought under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (citation omitted)); *Cantu v. Rocha,* 77 F.3d 795, 803 (5th Cir. 1996) ("[w]hether an order is an appealable 'final decision' for purposes of 28 U.S.C. § 1291 is a question of federal, not state, law" (citation omitted)); *United States v. Vasquez-Balandran*, 76 F.3d 648, 649-650 (5th Cir. 1996) (in deciding whether a prior conviction is a crime of violence under 18 U.S.C. § 2L1.2(b)(2), "federal law rather than state law applies," and therefore "the distinction made by the Texas courts is not controlling"); *United States v. Lopez*, 710 F.2d 1071, 1073-74 (5th Cir. 1983) (whether federal officer's arrest and detention of suspect was in the performance of his "official duties" within the meaning of 18 U.S.C. § 11 "is determined by federal, not state, law"). Additionally, the time in which to file a petition for writ of certiorari is determined by the date on which the lower court's judgment is entered, not the date of mandate. SUP. CT. R. 13.3. Moreover, in determining retroactive application of new rules of law, this Court has held that a state conviction becomes final "when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally decided." *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994).

> either rejects the petition for certiorari or rules on its merits. If the conviction does not become final by the conclusion of direct review, it becomes final by "the expiration of the time for seeking such review." We previously held that this includes the ninety days allowed for a petition to the Supreme Court following the entry of judgment by the state court of last resort. If the defendant stops the appeal process before that point, the conviction becomes final when the time for seeking further direct review in the state court expires. This holding is consistent with our previous decision in *Flanagan* [*v. Johnson*, 154 F.3d 196, 197 (5th Cir. 1998)], where finality was established by the expiration of the ninety-day period to seek further review with the Supreme Court, rather than the date the conviction became final for purposes of state law.

Roberts v. Cockrell, 319 F.3d at 694 (footnotes omitted).

Determining the nature, extent, and procedural rules surrounding direct review or collateral review under state law necessarily requires a federal court to resort to state law. *Evans v. Chavis*, 126 S. Ct. 846 (2006); *Carey v. Saffold*, 536 U.S. 214 (2002); *Salinas v. Dretke*, 354 F.3d 425, 430 n.5 (5th Cir. 2004). However, that does not mean that a federal court must determine whether a conviction is final for state law purposes and utilize that state law determination to ascertain the answer to the unrelated question of whether the conviction is final under the language of § 2244(d)(1)(A). To do so would be contrary to *Clay*. The federal statute itself declares what makes a judgment final, which is the conclusion of direct review or the expiration of time for seeking such review.

Consequently, in *Roberts*, the Fifth Circuit held that when there is no petition for discretionary review filed after a court of appeals issues an opinion, the conviction is final when the time expires for

filing a petition for discretionary review, which is thirty days after the court of appeals issued the opinion. *Roberts v. Cockrell*, 319 F.3d at 694-95.

In Texas, direct review does not end with the intermediate state court of appeals. Additional review is available in the Texas Court of Criminal Appeals. TEX. CONST. art. V, § 5; TEX. CODE CRIM. PROC. art. 4.04, § 2; TEX. R. APP. P. 66.1. In the present case, Flores had thirty days in which to seek review from the Court of Criminal Appeals after the state court of appeals issued its opinion. TEX. R. APP. P. 68.2(a). As the Fifth Circuit correctly held, pursuant to *Roberts*, the time for seeking such review expired thirty days after the state court of appeals issued its opinion. The judgment became final at that point for purposes of the AEDPA, and the federal AEDPA limitations period began then. No additional direct review was available.

Because there is no clear circuit conflict, and because the Fifth Circuit was correct in *Roberts*, there is no compelling reason warranting review, and certiorari should be denied.

II. The Second Question Presented for Review — Whether the Court below Correctly Held That Flores Was Not Entitled to Equitable Tolling — Is Unworthy of the Court's Attention.

Flores contends he should have received equitable tolling of the AEDPA statute of limitations. Flores has not shown any compelling reason for review of this ground.

The Fifth Circuit, as do the other circuits, recognizes that the AEDPA statute of limitations can be equitably tolled, but only in rare and exceptional circumstances. *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998). This Court has never held that equitable tolling applies to the AEDPA statute of limitations, but because litigants have assumed it applies, this Court has similarly assumed

so, without deciding the question. *See Pace v. DiGuglielmo*, 125 S. Ct. 1807, 1814 n.8 (2005). "Equitable tolling is a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs." *Wallace v. Kato*, 127 S.Ct. 1091, 1100 (2007). To show entitlement to equitable tolling, a litigant must demonstrate "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Lawrence v. Florida*, 127 S. Ct. 1079, 1085 (2007), quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

Here, the Fifth Circuit reviewed the equitable tolling issue for an abuse of discretion. PA 3a.

As the Fifth Circuit observed in the *Flores* and *Roberts* opinions, there was a split among the federal district courts in Texas regarding when convictions became final. PA 4a; *Roberts v. Cockrell*, 319 F.3d 694 n. 18; *see Mott v. Johnson*, No. 3:01-CV-0171-R, 2001 WL 671476, at * 2 (N.D.Tex. June 12, 2001) (stating that petitioner's conviction became final thirty days after court of appeals rendered judgment). *But see Royale v. Johnson*, No. 3:01-CV-1063-X, 2001 WL 1148946, at *3 (N.D.Tex. Sept.18, 2001) (stating that "finality of a judgment is determined pursuant to state law" which holds that judgment does not become final until mandate has issued); *Howard v. Johnson*, No. 3:00-CV-2032-P, 2001 WL 720489, at *2 (N.D.Tex. June 21, 2001)(same); *Rose v. Johnson*, No. 3:01-CV-0386-M, 2001 WL 880689, at *1 (N.D.Tex., June 21, 2001)(same); *Hunt v. Johnson*, No. 3:01-CV-0578-M, 2001 WL 484191, at *1 (N.D.Tex., May 3, 2001) (same).

There was also a conflict among circuits as to whether state or federal law controlled the question of finality. *See Wixom v. Washington*, 264 F.3d 894, 897-98 (9th Cir.2001) (rejecting, for purposes of § 2244(d)(1)(A), use of Washington state law which

views issuance of mandate as making conviction final); *Tinker v. Moore*, 255 F.3d 1331, 1333 (11th Cir.2001) (holding that under Florida law, issuance of mandate on direct appeal makes criminal judgment final, and that that date will be used for purposes of § 2244(d)(1)(A)).

Therefore, before Flores's federal limitations period expired on September 22, 2001, there was authority similar in character to, but contrary to the legal holding of, the cases relied on by this district court to show that Flores's attorney followed federal law at the time in ascertaining the beginning of the federal limitations period. At best for Flores, there was a split in authority at that time.

In *Fierro v. Cockrell*, 294 F.3d 674 (5th Cir. 2002), the petitioner claimed that he believed that the AEDPA one-year limitations period did not apply to successive habeas petitions and he also believed that filing a petition for certiorari to the United States Supreme Court from the denial of his state habeas petition tolled the limitations period. *Id.* at 682. The petitioner argued that he was entitled to equitable tolling because his untimely filing was based on an interpretation of the AEDPA statute of limitations that was reasonable at the time but that was later determined to be incorrect. *Id.* at 683. The Fifth Circuit reiterated that "a lack of knowledge of the law, however understandable it may be, does not ordinarily justify equitable tolling." *Id.* That court further explained:

> Although the application and interpretation of the AEDPA statute of limitations was somewhat unsettled during this period, we think that such uncertainty should have militated against taking an unnecessary risk by waiting to file a motion for authorization and habeas petition. Given the nature of the interests at stake, it seems to us that it was incumbent upon counsel to err on the side of caution and file Fierro's petition within the most conservative of

> possible deadlines under the statute. In short, counsel's erroneous interpretation of the statute of limitations provision cannot, by itself, excuse the failure to file Fierro's habeas petition in the district court within the one-year limitations period.

Id.

As with *Fierro*, prudence would have dictated that the earlier beginning point be used in Flores's situation until the matter was settled. There was no practical reason for not doing so, and there was a risk of being time-barred for not doing so. In the present case, the Fifth Circuit correctly held that "Flores should have elected to err on the side of caution and abide by the earlier of the two possible deadlines." *Flores*, slip op. at 5. "Attorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the postconviction context where prisoners have no constitutional right to counsel." *Lawrence v. Florida*, 127 S. Ct. at 1085.

Flores argues that if he filed his state writ application before the mandate issued, it would have been dismissed as premature. That is correct. *Ex parte Johnson*, 13 S.W.3d 472 (Tex. Crim. App. 2000). However, once mandate issued, Flores could have then filed his state writ application. As the Fifth Circuit observed, ten months still remained in the AEDPA limitations period at that point. Moreover, the pendency of a state writ application, properly filed after the mandate had issued, would have statutorily tolled the limitations period. 28 U.S.C. § 2244(d)(2); *Artuz v. Bennett*, 531 U.S. 4, 8 (2000).

Flores maintains that he was entitled to one year in which to file his federal writ petition, not ten months. However, Flores had one year from the expiration of time for seeking further direct review from the Court of Criminal Appeals. His only problem was that he could not file a state writ application for the first three months of

that one-year period. It did not mean he could not prepare, or begin to prepare, his state writ application during that time. In fact, Flores did not file his state writ application until almost one year after mandate issued. Nothing prevented him from filing it sooner.

Flores argues that this Court observed in *Day v. McDonough*, 126 S.Ct. 1675 (2006), that a federal district court has the discretion to decide whether the administration of justice is better served by dismissing a case on statute of limitations grounds or by reaching the merits of a petition. However, that was in the context of whether a district court had authority to consider *sua sponte* the timeliness of a federal petition. In that context, the Respondent argued in *Day* that when the government does not raise a statute of limitations issue, the district court may raise the matter *sua sponte* and dismiss the petition as untimely or reach the merits of the petition, deciding in the court's discretion whether justice is better served by one or the other. *Id.* at 1683. This Court ultimately agreed. *Id.* However, this Court did not hold that a district court has discretion whether to enforce the AEDPA statute of limitations when the issue is raised by the government.[7]

Because the district court's rationale for granting equitable tolling was flawed, the Fifth Circuit correctly held that court abused its discretion.

More significantly, the Fifth Circuit's application of equitable principles to Flores's fact situation provides no compelling reason for review.

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[7] Here, the Respondent raised the statute of limitations in the district court. *See cert pet.* at 5; PA 2a.

CONCLUSION

For the foregoing reasons, this Court should deny Flores's petition for writ of certiorari.

Respectfully submitted,

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